

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-7088

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1241-September Term 1976

(Argued May 27, 1977
Decided August 26, 1977)

DOCKET NO. 77-7088

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P/S

RICHARD J. STULL,

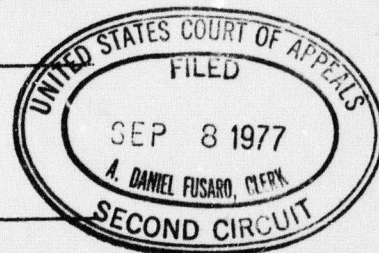
Plaintiff-Appellant

-against-

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD
PIPER, THOMAS F. PIPER and WILLIAM T. PIPER,
JR., individually and as Executors of the
Estate of William T. Piper, Deceased, NICHOLAS
M. SALGO, DAVID W. WALLACE, BANGOR PUNTA
CORPORATION and THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

PETITION FOR REHEARING EN BANC



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PETITION FOR REHEARING EN BANC

Plaintiff-Appellant petitions the Court, pursuant
to Rule 35 of the Federal Rules of Appellate Procedure,
for a rehearing and respectfully suggests that said rehearing
should be en banc.

In this case of first impression involving a claim made solely under Section 14(e) of the Securities Exchange Act of 1934 (the "Williams Act"), the Court determined that the New York Statute of Limitations commenced to run as far as Piper non-tendering shareholders were concerned on the date of the last fraudulent publication by any defendant. It held that plaintiff had a right to seek legal relief, regardless of his decision concerning tender of his shares, since "he might well have sustained damage because of the depressing effect which disclosure of the ...[misrepresentation] might have had on the market value of ...the stock...." (Brackets added).^{*} Plaintiff did not allege nor was it proven by any party below that the misrepresentations depressed the market price of Piper stock.

The decision has, we submit, far-reaching implications in an area which has become extremely important in the corporate and business world to the point where one can observe that tender offers "are a way of life." Litigations arising from tender offer

^{*} Two Judges of the Panel were: Honorable Lawrence W. Pierce, United States District Judge of the Southern District of New York and Honorable William O. Mehrtens, United States District Judge of the Southern District of Florida, sitting by designation.

situations have increased in ever larger numbers, thereby requiring that there be full consideration to the issues, their implications suggested by the Court's decision and fundamental objectives of Section 14(e) governing tender offers.*

We submit that the Court erred in its conclusion in determining the "accrual date" for the running of the Statute of Limitations for a Section 14(e) violation is the last date of fraudulent publication and its error raises far-reaching implications.

1. The Court based its view on Electronic Specialty Co. v. International Control Corp., 209 F.2d 937, 946 (2d Cir. 1969), in which standing to sue for injunctive relief was given to a non-tendering shareholder because "a non-tenderer suffers no immediate injury from inadequacy of price in a sense that he retains his stock, such inadequacy is likely to have a depressing effect on the market for some time and thus may hurt him if, for one reason or another, he should later find it necessary or desirable to sell...."

* It should be noted that en banc consideration was given to the dispute between two competing tender offerors in Piper. We submit like consideration is required for the issues in this case.

In the first place, Electronic Specialty Co. involved a case where defendants were accused of making an inadequate offer and depressing the price of the stock as sold in the open market in order to make that inadequate offer appear adequate. At bar, there is no issue of inadequacy of tender or market price.

Secondly, and more importantly, the Court, here, equated standing to sue for an injunction to the right to sue for damages. The fact that a plaintiff may have standing to seek injunctive relief does not mean that he has immediate standing to seek damages. Indeed, injunctions are granted to prevent irreparable injury, i.e. damage to a plaintiff. Hence, a potential decline of the market price would very well be the type of irreparable injury necessary to permit an injunction. However, potential decline of market prices is not "economic loss" which gives a plaintiff standing to sue for damages. To imply that a non-tendering plaintiff would have the right to sue for the decline in market value of his shares is contrary to the express language of Section 28 of the Securities Exchange Act of 1934 and has been rejected as a rationale for suits under 10(b).

Cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S. Ct. 1917 (1975); Levine v. Seilon, Inc., 439 F.2d 328, 334-5 (2d Cir. 1971). It should be rejected for suits under Section 14(a) as well.

Indeed, the Second Circuit implicitly rejected the rationale in early suits involving tender offers. See Mutual Shares Corporation v. Genesco, Inc., 384 F.2d 540, 547, (2 Cir. 1967), Iroquois Industries, Inc. v. Syracuse China Corporation, 417 F.2d 963, 968 (2d Cir. 1969).

The Court's decision would make possible lawsuits for speculative damages and for profiting speculation that it criticized in Footnote 4 of its Opinion and would appear to overrule by silence established precedents.

We submit that the rule does violence to Section 14(e) and the intent of Congress. It ignores what plaintiff is actually suing about. His claim is that he was deprived of a tender offer and that claim has nothing whatever to do with the decline (or possible decline) of market prices. If he had sued at any time prior to August 4, 1969, the defendants would be able to argue successfully that he could have tendered his stock at any time up to August 4. By like token, if he brought suit, prior to August 4, 1969, defendants could have made truthful disclosure and he

could have been able to accept the tender. Could plaintiff accept the tender offer and then sue for damages based upon an earlier market decline in stock price? We submit that if he accepted the tender offer prior to August 4, 1969, the question of possible market decline would be irrelevant.

The only case which has ever dealt with the question of damages for a non-tendering shareholder is Neuman v. Electronic Specialty Co. ['69-'70 CCH Sec. Dec.] Fed. Sec. L. Rep. ¶ 92,591 (N.D. Ill. 1969). In that case, the Court sustained a complaint inter alia, for Section 14 violation based upon a measure of damage consisting of the difference between the tender offer which had expired and which plaintiff claimed they were prevented from accepting by virtue of false representations, and the market price of the stock they could have sold or did sell their securities after the termination of the tender offer.

The law has always been that where the wrongdoer can have the benefit of proper conduct, the right to sue does not arise until the wrongdoer is unable to correct his misconduct. See Barninger v. National Maritime Union, 372 F. Supp. 908 (S.D. N.Y. 1974); Allen v. Payson,

170 Misc. 759, 11 N.Y.S. 2d 28 (S. Ct. Queens Co. 1939);
Instrument Systems Corporation v. Whitman, et al., 77 Misc.
2d 719, 354 N.Y.S. 2d 541 (S. Ct. N.Y. Co. 1974).

In sum, the economic loss sustained by the plaintiff is the loss of the tender offer and not the decline in the market value of the stock.

2. If the Court intended to hold that non-tendering shareholders have only the right, under Section 14(e), to sue for an injunction, then the opinion should so state. Such a view would, of course, be at odds with the spirit and intendment of Section 14(e), as well as its express language. Indeed, the only authority to pass on this question has sustained the right to sue for damages. See Neuman v. Electronic Specialty Co., et al., supra.

3. Indeed, the rule suggested by the Court has implications for those who tender their stock pursuant to a fraudulent tender offer. Although the law has always viewed the Statute of Limitations as running from acceptance see Reusens v. Gerard, 160 App. Div. 625, 146 N.Y. Supp. 86 (1st Dep't 1914), aff'd. 221 N.Y. 665 (1917), the holding would require that Limitations would run for tendering stockholders from the date of the last fraudulent representation though the acting upon the fraud occurred substantially later.

Such a rule stands the law of limitations on its head and if that is to be the rule in this Circuit it should be only after en banc consideration.

4. The Court's ruling in this case placed undue emphasis on the last affirmative act by one of the defendants, i.e. Bangor Punta, in promulgating the fraudulent registration offer without giving effect to the fact that that act was an accumulation of all of the prior fraudulent acts. It ignored the silence of defendants thereafter until August 4, 1969 when the Chris-Craft offer expired. The defendants had a duty to speak and to correct the impact and the impressions of their earlier fraudulent conduct. Cf. Chris-Craft Industries, Inc. v. Piper Aircraft Corp. 480 F.2d 341. Indeed, the Pipers communicated with the shareholders on July 25, 1969, improperly urging acceptance of the Bangor Punta offer. See 480 F.2d 341, 366. In short, defendants were committing a continuing wrong and as such, the Statute of Limitations could not be deemed to commence to run until either the conduct ceased or it no longer mattered.

See Hayman v. Morris, 46 N.Y.S. 2d 482, 493 (S. Ct. N.Y. Co. 1943);

Instrument Systems Corporation v. Whitman, et al.
supra.

5. The Court's decision holds, in effect, that the New York Statute of Limitations of six years with respect to fraud suits can be reduced to two years from the "discovery of the fraud." (CPLR § 203(f)). In so applying the New York Statute of Limitations, the Court creates an exception to the fundamental rule that where there has been fraudulent concealment, the Statute of Limitations does not commence to run until "discovery." Any attempt to reduce the period of the applicable Statute of Limitations to a shorter period as a result of the discovery does violence to the "federal" rule since it reduces the right of an injured party. See Pollard v. U.S.A. 384 F.Supp. 304 (N.D. Ala. 1974); Long v. Abbott Mortgage Company, 424 F.Supp. 1095 (D. Conn.1976. Ignoring the two year cut off would provide uniformity to enforcement issues in securities violations.

New York law, moreover, suggests that where a fraudulent concealment leads to the failure to exercise rights (as here, where plaintiff did not accept the tender offer), the shorter two year period does not apply but that the general six year period applies from the date of discovery. See Devito v. New York Central System, 22 A.D. 2d 600, 257 N.Y.S. 2d 895, 899 (1st Dep't 1965).

At bar, plaintiff did not discover the fraud until 1971. He ought to have had until 1977 to sue. He brought this action in 1975. We submit that he was timely.

6. The Court in this decision, refused to permit plaintiff the benefits of any tolling under the doctrine of American Pipe v. Utah, 414 U.S. 538 (1974). It concluded that any benefits belong to those who intervene prior to the expiration of the Statute of Limitations. However, the decision seems to ignore what Mr. Justice Powell stated in Eisen v. Carlyle & Jacquelin (Eisen IV) 417 U.S. 156, 176 (1974). He stated in Footnote 13:

"Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414 U.S. 238, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." (Emphasis supplied)

In the concurring opinion, Mr. Justice Douglas supported this broader reading of American Pipe, see Pages 181 and 182 of 417 U.S.

Mr. Justice Powell did not limit his comments to intervenors.

The District Court in this case could not reconcile this Footnote calling it "a puzzling Footnote" which "... might suggest a broader reading of the effect of American Pipe...." (424 F.Supp. 937, 943).

Other courts have not limited American Pipe to intervention alone. See In Re Master Key Antitrust Litigation, 70 FRD 29 (D. Conn. 1976); Agostine v. Sidcon Corporation, 69 FRD 437, 448, Note 13 (E.D. Pa. 1975). Cf. Katz v. Carte Blanche Corporation, 496 F.2d 747, 761 (3rd Cir. 1974).

To propose the limitation suggested by the Court would seriously impede the commencement and prosecution of class actions and have a chilling effect on the enforcement of the securities laws.

Indeed, in Hellerstein v. Mather, 360 F.Supp. 473 (D. Colo. 1973) (decided before American Pipe but which relied upon the Ninth Circuit decision, 473 F.2d 590), the Court held that members of a putative class should be free to bring their own separate actions without intervention and still obtain the benefits of American Pipe.

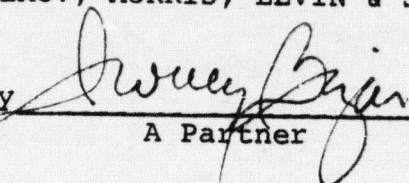
We respectfully suggest that rehearing on en banc should be had. The issues are important and since they

involve fundamental questions of first impression under
Section 14(e), which have heretofore not been decided, and
to insure uniformity with previously established authorities,
such rehearing is necessary.

Dated: September 6, 1977.

DEMOV, MORRIS, LEVIN & SHEIN

By


A Partner

Attorneys for Plaintiff-Appellant

STATE OF NEW YORK)

COUNTY OF NEW YORK)

: ss.: .

Joy Karwell , being duly sworn, deposes and
says:

I am not a party to the action, am over the age
of eighteen years, and reside ~~at~~ within City of New York
New York

On September 8, , 1977, I served the within

Petition for Rehearing En Banc

upon the party therein named by mailing the same to said
party or to his attorney at the address designated by him
for that purpose, by depositing a true copy thereof in a
postpaid properly addressed wrapper in an official de-
pository under the exclusive care and custody of the
United States Post Office Department within the State,
as follows:

Rogers & Wells, Attorneys for Deft. Appellee
Bangor Punta Corporation, 200 Park Avenue, New York, N.Y. 10017;
Sullivan & Cromwell, Esqs., Attorneys for Deft.-Appellee The
First Boston Corporation, 48 Wall Street, New York, N.Y. 10005
and Messrs. Chadbourne, Parke, Whiteside & Wolff, Attorneys
for Defts.-Appellees Piper, 30 Rockefeller Plaza, New York, New
York 10020

Joy Karwell

Sworn to before me this
8th day of September, 1977

Mildred B. Honig
Notary Public

MILDRED B. HONIG
NOTARY PUBLIC, State of New York
No. 41-1850361 Queens County
Certificate filed in New York County
Term Expires March 30, 1979

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